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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

GLENN H. SONSTENG, Personal)	Civil No. 3:06-CV-476-SU
Representative of the Estate of)	
EDNA M. SONSTENG, Deceased,)	
)	
Plaintiff,)	MEMORANDUM OF LAW
)	IN SUPPORT OF DEFENDANT
v.)	SPOKAS' MOTION FOR
)	SUMMARY JUDGMENT
THE DOMINICAN SISTERS OF)	
ONTARIO, INC., an Oregon)	
non-profit corporation, dba HOLY)	
ROSARY MEDICAL CENTER;)	
JOSEPH J. BOYLE, M.D., and)	
FRANK J. SPOKAS, M.D.,)	
)	
Defendants.)	

Dr. Spokas' summary judgment motions are based on the ORS 12.110(4) statute of ultimate repose. This court has previously addressed the statute's application in the context of defendants' motions to dismiss. The court's ruling was based on the sufficiency of plaintiff's allegations as a matter of law. Because the defendants filed motions to dismiss, no party offered any evidence in support of its statute of limitations arguments.

1 Since the court's ruling on defendants' motions, the parties have taken
 2 numerous depositions and have presented their revised allegations in a Pretrial
 3 Order. Additionally, since the court's ruling plaintiff has added an allegation that
 4 was not included in his Amended Complaint when the court ruled. Dr. Spokas'
 5 summary judgment motions are based on the court's prior ruling and the facts the
 6 depositions reveal. Because this court's prior ruling did not address whether the
 7 evidence supported plaintiff's allegations, the court has not previously addressed
 8 the issues defendant's summary judgment motions raise.

9 10 **I. SUMMARY JUDGMENT STANDARD**

11 A party is entitled to summary judgment if the pleadings, depositions,
 12 admissions and affidavits show there is no genuine issue as to any material fact
 13 and the moving party is entitled to judgment as a matter of law. F.R.Civ.P 56(c).
 14 There is no genuine issue of material fact unless the evidence is such that a
 15 reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty*
 16 *Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

17 On summary judgment, the court views the underlying facts in a light most
 18 favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors*
 19 *Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). The court resolves all reasonable doubts
 20 regarding the existence of genuine issues of material fact against the moving party.
 21 *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).

22 The court also draws all reasonable inferences in favor of the nonmoving
 23 party. *U.S. v. Shumway*, 199 F.3d 1093, 1103-04 (9th Cir. 1999). When different
 24 inferences may reasonably be drawn from the undisputed facts, summary judgment

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1 is improper. *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 988 (9th Cir.
2 2006).

3 **II. MOTION 1 – ALLEGED FAILURE TO DIAGNOSE DECEDENT’S TUMOR.**

4 After this court ruled on defendants’ motions to dismiss, plaintiff added the
5 following allegation of negligence:

6 “The defendants and each of them were negligent in at least one of the
7 following particulars:

8 a. Failed to diagnose that decedent was suffering from a malignant
9 tumor...”

10 The court has not previously addressed whether the ORS 12.110(4) statute of
11 ultimate repose bars the new allegation. However, the court previously held the
12 statute of ultimate repose bars similar allegations.

13 In ruling on defendants’ previous motions, this court dismissed all
14 allegations of negligence that “...directly concern the defendants’ failure to read,
15 evaluate, inform each other, further evaluate, follow up, advise, or inform plaintiff’s
16 decedent regarding the chest x-ray.” Findings and Recommendation p. 12. More
17 specifically, this court dismissed plaintiff’s Amended Complaint allegations in ¶ 7 (a)
18 – (g). Id. The court held the statute of ultimate repose barred allegations that Dr.
19 Spokas failed to read or evaluate decedent’s chest x-ray, (Amended Complaint, ¶
20 7a), failed to obtain a radiological consultation to further evaluate the x-ray,
21 (Amended Complaint, ¶ 7c) and failed to obtain an oncological consultation in order
22 to follow up and treat the mass in decedent’s chest, (Amended Complaint, ¶ 7f).
23 Findings and Recommendation, p. 12. These dismissed allegations all relate to Dr.
24 Spokas’ alleged negligent failure to diagnose decedent’s tumor.

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1 The newly added allegation is no different from those the court has already
 2 dismissed. Even though plaintiff does not mention the x-ray, the allegation that Dr.
 3 Spokas failed to diagnose plaintiff's tumor is an allegation of negligence that directly
 4 concerns Dr. Spokas' failure to read and evaluate the decedent's x-ray. Dr. Spokas
 5 could not have diagnosed the decedent's tumor if he did not read and evaluate the
 6 x-ray or the report thereof. Declaration of Frank J. Spokas, M.D., ¶4; 5.

7 Based on this court's prior ruling, Dr. Spokas is entitled to judgment as a
 8 matter of law. The statute of ultimate repose bars the Pretrial Order allegation at
 9 paragraph 4.a.(9)(a).
 10

11 **III. MOTION 2 - ALLEGED FAILURE TO ADVISE DECEDENT TO SEEK**
 12 **FURTHER TREATMENT FOR HER TUMOR.**

13 Plaintiff alleges Dr. Spokas negligently "failed to advise decedent to seek
 14 further treatment and evaluation of her tumor". This allegation was included in
 15 plaintiff's Amended Complaint when the court ruled; however, the court's prior
 16 ruling did not specifically address it. Even if this allegation was sufficient to survive
 17 a motion to dismiss, the court's prior ruling bars the allegation because plaintiff
 18 cannot establish a negligent failure to advise without proving negligence related to
 19 the chest x-ray.

20 The decedent came to the emergency room with gallbladder disease. Spokas
 21 Declaration, ¶ 3. Nothing about decedent's condition could have alerted Dr. Spokas
 22 that decedent had a lung tumor. Spokas Declaration, ¶¶ 3; 4. He could not have
 23 diagnosed decedent's tumor without the chest x-ray or report thereof. Spokas
 24 Declaration, ¶ 4. Consequently, Dr. Spokas could not have advised decedent to
 25 seek further evaluation of her tumor without reading the chest x-ray or report
 26 thereof and advising her of the chest x-ray results. Spokas Declaration, ¶ 5. Like

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1 the allegation at paragraph 4.a.(9)(a), the Pretrial Order allegation at paragraph
 2 4.a.(9)(d) directly concerns “defendants’ failure to read, evaluate, inform each other,
 3 further evaluate, follow up, advise, or inform plaintiff’s decedent regarding the chest
 4 x-ray.” Findings and Recommendation, p. 12.

5 This court previously dismissed the allegation that Dr. Spokas “failed to
 6 advise, inform, or in any way discuss with decedent, the findings on her chest x-ray
 7 of February 25, 2000”. Amended Complaint, ¶ 7(e). Because Dr. Spokas could not
 8 have advised decedent to seek treatment for her tumor without knowing about the
 9 chest x-ray or report thereof, the dismissed allegation is nearly identical to the
 10 allegation that Dr. Spokas “failed to advise decedent to seek further treatment and
 11 evaluation of her tumor”. The statute of ultimate repose bars the Pretrial Order
 12 allegation at paragraph 4.a.(9)(d) as a matter of law.

14 **IV. MOTION 3 – FAILURE TO TREAT AND REMOVE DECEDENT’S TUMOR.**

15 Plaintiff alleges Dr. Spokas “failed to treat decedent’s tumor” and “failed to
 16 surgically remove decedent’s tumor”. This court’s prior ruling did not dismiss
 17 these allegations in plaintiff’s Amended Complaint. The court held allegations that
 18 Dr. Spokas failed to treat decedent’s tumor were sufficient to survive a motion to
 19 dismiss. The court’s ruling only addressed the sufficiency of the allegations. The
 20 court did not address whether plaintiff could offer any evidence to support the
 21 allegations without reference to the chest x-ray.

22 Plaintiff cannot prove Dr. Spokas negligently failed to treat or remove
 23 decedent’s tumor without proving Dr. Spokas’ negligence regarding the chest x-ray.
 24 Based on this court’s prior ruling, the ORS 12.110(4) statute of ultimate repose

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1 bars all negligence allegations and Dr. Spokas is entitled to judgment as a matter of
2 law.

3 **A. SUMMARY OF ARGUMENT**

4 Plaintiff must prove Dr. Spokas' conduct caused the claimed injuries. This
5 court has held the statute of ultimate repose bars allegations of negligence that
6 directly concern the failure to read and follow up on the x-ray. Plaintiff cannot
7 prove Dr. Spokas negligently failed to treat or surgically remove decedent's tumor
8 without proving he negligently failed to read and follow up on the x-ray. Because
9 plaintiff cannot establish factual causation without proving negligence related to the
10 x-ray, Dr. Spokas is entitled to judgment as a matter of law.

11 **B. NO MATERIAL FACTS ARE IN DISPUTE.**

12 Only genuine issues regarding a material fact can preclude summary
13 judgment. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, *supra*, 809 F.2d at
14 630. A material fact is one that is relevant to an element of a claim or defense and
15 whose existence might affect the outcome of the suit. *Id.* The substantive law
16 applicable to the claim determines whether a fact is material. *Id.*

17 The substantive law applicable to Dr. Spokas' summary judgment motion is
18 the statute of ultimate repose at ORS 12.110(4). Because this court has determined
19 ORS 12.110(4) bars allegations that directly concern Dr. Spokas' failure to read,
20 evaluate and follow up on decedent's x-ray, the legal issue is whether plaintiff's
21 allegations "directly concern" that failure. The factual issue is whether plaintiff can
22 prove Dr. Spokas negligently failed to treat or remove decedent's tumor without
23 reference to decedent's chest x-ray.

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1 There was conflicting deposition testimony regarding whether Dr. Spokas or
 2 another hospital physician ordered the x-ray. There was also conflicting deposition
 3 testimony regarding whether the x-ray report was ever delivered to Dr. Spokas.
 4 However, neither evidentiary conflict creates a genuine issue of material fact. The
 5 sole question for purposes of the statute of ultimate repose is the relationship
 6 between the misleading representation and the allegation of negligence. When the
 7 representation goes to the gravamen of the negligence allegation, ORS 12.110(4)
 8 bars the negligence allegation. *Jones v. Salem Hospital*, 93 Or App 252, 262, 762
 9 P2d 303 (1988), *rev den* 307 Or 514.

10
 11 In this case, the alleged misleading representation is that decedent's chest x-
 12 ray was normal. If that representation goes to the gravamen of the allegations Dr.
 13 Spokas failed to treat and remove decedent's tumor, ORS 12.110(4) bars the
 14 allegations.

15 **C. BASED ON DEPOSITION TESTIMONY, ALL NEGLIGENCE**
 16 **ALLEGATIONS GO TO THE GRAVAMEN OF PLAINTIFF'S**
COMPLAINT.

17 **1. Plaintiff Must Offer Evidence That Dr. Spokas' Conduct Caused**
 18 **The Injuries Claimed.**

19 To prevail on his negligence claim, plaintiff must prove a causal link
 20 between Dr. Spokas' conduct and the injuries plaintiff claims. *Oregon Steel Mills,*
 21 *Inc. v Coopers & Lybrand, LLP*, 336 Or 329, 340, 83 P3d 322 (2004). Proof of
 22 causation requires evidence that but for Dr. Spokas' negligence, plaintiff would not
 23 have been harmed. *Joshi v. Providence Health System of Oregon Corp.*, 198 Or App
 24 535, 538-39, 108 P.3d 1195 (2005), *aff'd*. 342 Or 152. Plaintiff must show that
 25 plaintiff's injuries, as a factual matter, would not have occurred "but for" Dr.
 26

Spokas' conduct. *Wallach v. Allstate Ins. Co.*, 206 Or App 137, 143, 135 P3d 404 (2006), *aff'd*. 344 Or 314.

2. Plaintiff Cannot Prove Causation Without Proving Dr. Spokas Negligently Failed To Read And Evaluate The X-ray.

Plaintiff's allegations that Dr. Spokas negligently failed to treat and remove decedent's tumor require plaintiff to preliminarily prove Dr. Spokas negligently failed to read and evaluate decedent's chest x-ray. Dr. Spokas treated decedent as an emergency room patient with gallbladder disease. Spokas Declaration, ¶ 3. There is no evidence decedent came to the emergency room complaining of any lung problem or lung tumor. Spokas Declaration, ¶ 3. The only way Dr. Spokas could have suspected the tumor was if he had read the x-ray report. Spokas Declaration, ¶ 4. During the time he treated decedent, the only evidence that could have alerted Dr. Spokas that decedent had a tumor was the x-ray report. Spokas Declaration, ¶ 4. As a matter of law Dr. Spokas' negligence could only have caused plaintiff's injury if Dr. Spokas negligently failed to follow up on and evaluate the x-ray or report thereof.

The statute of ultimate repose bars allegations of negligence that directly concern defendant's failure to evaluate and follow up on the chest x-ray or report thereof. Because plaintiff's allegations require proof of a negligent act the statute of limitations bars, the statute of limitations bars the allegations plaintiff failed to treat and remove decedent's tumor.

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D. THE CONTINUING TREATMENT IN MARCH AND APRIL DOES NOT EXTEND THE STATUTE OF ULTIMATE REPOSE.

1. Contemporaneous Statements That Go To The Gravamen Of Plaintiff's Negligence Allegations Do Not Extend The Statute Of Ultimate Repose.

Plaintiff does not allege Dr. Spokas made an intentional or fraudulent misrepresentation. Plaintiff's tolling argument is based on an innocent representation.

ORS 12.110(4) does not extend the statute of ultimate repose when an innocent misleading representation is both contemporaneous and goes to the gravamen of the negligence allegations. *Duncan v. Augter*, 286 Or 723, 732, 596 P2d 555 (1979).

2. This Court Has Not Addressed Whether The March And April Post-Operative Care Was Contemporaneous With The February Surgery.

This court's prior ruling addressed whether the misleading representation went to the gravamen of plaintiff's negligence allegations. Although the ruling mentions the contemporaneousness requirement in summarizing *Duncan* and *Skuffeeda v. St. Vincent Hosp. & Medical Center*, 77 Or App 477, 714 P2d 235 (1986), *rev den* 301 or 240, this court's prior ruling did not specifically discuss the standard Oregon appellate decisions apply to determine whether a representation is contemporaneous. (Findings and Recommendation, pp. 10-11).

The court did, however, point out that plaintiff alleged "defendants continued the misleading representation during the post-operative care". Findings and Recommendation, p. 12. The court allowed plaintiff to proceed on allegations "regarding defendants' failure to treat the cancerous tumor and defendants'

continuing of the misleading representation during post-operative care". Findings and Recommendation, p. 13.

In the Pretrial Order, plaintiff has not alleged Dr. Spokas continued the misleading representation. Additionally, at the time this court ruled on the motions to dismiss, there was no evidence regarding when the post-operative treatment occurred or whether Dr. Spokas had any knowledge about the x-ray when he saw plaintiff's decedent for post-operative treatment.

When the court ruled, the Amended Complaint allegations were arguably sufficient to survive a motion to dismiss. However, in light of deposition testimony and Dr. Spokas' Declaration, Dr. Spokas is entitled to judgment as a matter of law. Under the relevant standard, any alleged misleading representation during post-operative care was contemporaneous with the February treatment.

3. A Continued Representation Remains Contemporaneous Unless The Physician Knows Or Has Reason To Know New Information.

Jones v. Salem Hosp., supra, 93 Or App at 266 establishes the standard to determine whether a representation is contemporaneous by describing when contemporaneousness ends. The court states:

"Contemporaneousness ends when the maker of the representation knows or has reason to know information which he did not have at the time of the negligently performed procedure or its immediate aftermath and which reasonably indicates that something in the performance of or related to the procedure went wrong." 93 Or App at 266.

Under the *Jones* standard, plaintiff cannot extend the statute of ultimate repose based on a post-operative representation unless Dr. Spokas either knew or had reason to know new or additional information during the post-operative treatment that he did not have when he performed surgery in February. Because

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1 the alleged misleading representation concerns the x-ray results, the new
2 information must relate to the chest x-ray.

3 **4. Dr. Spokas Did Not Know About The X-Ray When He Provided**
4 **Post-Operative Care In March and April.**

5 Dr. Spokas' post-operative treatment of decedent occurred on March
6 8, 2000 and April 6, 2000. Spokas Declaration, ¶ 6. The only purpose of the post-
7 operative treatment was to follow up on decedent's surgery. Spokas Declaration, ¶
8 6. These visits were a continuation of decedent's gallbladder treatment. Spokas
9 Declaration, ¶6. Dr. Spokas did not see the decedent for any treatment after April
10 6, 2000. Spokas Declaration, ¶ 6.

11 Dr. Spokas did not see or treat decedent for a possible tumor at any time.
12 Spokas Declaration, ¶ 7. There is no evidence Dr. Spokas acquired any knowledge
13 of the chest x-ray between the surgery in February and the post-operative follow-up
14 care that ended April 6, 2000. Dr. Spokas did not see or review the x-ray or report
15 thereof when he saw decedent for her surgical follow-up in March and April 2000.
16 Spokas Declaration, ¶ 7. Neither the chest x-ray nor the x-ray report was in his
17 office patient file for decedent. Spokas Declaration, ¶ 7.

18 **5. Dr. Spokas Had No Reason To Know About The Chest X-ray**
19 **When He Signed The Coding Summary Report For Insurance**
20 **Billing Purposes.**

21 On March 31, 2000, Dr. Spokas signed a Coding Summary Report.
22 Spokas Declaration, ¶ 8. By signing the document, he certified "that the narrative
23 descriptions of the principal and secondary diagnoses and the major procedures
24 performed are accurate and complete to the best of my knowledge". Spokas
25 Declaration, ¶ 10; Declaration, Exhibit A. By signing the Coding Summary Report,
26 Dr. Spokas certified that the diagnosis of Cholelithiasis with acute cholecystitis was

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1 a correct diagnosis related to plaintiff's decedent's treatment. Spokas Deposition, p.
2 33, lines 2-25; Spokas Declaration, ¶ 10.

3 The Coding Summary Report is prepared for the purpose of billing a patient's
4 insurance. Spokas Declaration, ¶ 8. Dr. Spokas' signature on the report means he
5 read the report, the report principal and secondary diagnoses are accurate and the
6 report major procedures are the ones he performed on the decedent to his
7 knowledge. Spokas Deposition, p. 34, lines 14-23; Spokas Declaration, ¶ 10.

8 It is not Dr. Spokas' practice to review a patient's chart when he signs the
9 Coding Summary Report. Spokas Declaration, ¶ 9. Dr. Spokas had performed
10 decedent's surgery approximately one month before signing the Coding Summary
11 Report. Spokas Deposition, p. 34, lines 8-9. Signing the Coding Summary Report
12 without reviewing decedent's chart was appropriate under the relevant standard of
13 care. Spokas Declaration, ¶ 9.

14 Dr. Spokas had no reason to review the decedent's entire chart when he
15 signed the Coding Summary Report. Spokas Declaration, ¶ 9; Spokas Deposition,
16 p. 35, line 24. If he had no reason to review the decedent's entire chart, Dr. Spokas
17 would have had no reason to come across the chest x-ray or the chest x-ray report.
18 Therefore, Dr. Spokas would not have had any reason to know of any information
19 he did not have in February when he performed decedent's gallbladder surgery.
20

21 **6. Any Alleged Misleading Representation During Post-operative**
22 **Care Was Contemporaneous With The Decedent's Initial**
23 **Treatment.**

24 Any alleged March or April misleading representation is exactly the
25 same misleading representation that occurred in February. The facts in this case
26 are not like those in *Skuffeeda v. St. Vincent Hosp. & Medical Center, supra*, 77 Or

1 App 477 where new information came to the physician's attention during the
 2 continuation of treatment. In *Skuffeeda*, post-operative x-rays revealed a screw near
 3 plaintiff's heart. The *Skuffeeda* defendant did not inform plaintiff of the post-
 4 operative x-ray results.

5 There was no post-operative procedure in this case. Dr. Spokas did not
 6 know about and had no reason to know about the chest x-ray when he provided
 7 post-operative care. Consequently, any March or April misleading representation
 8 was contemporaneous with the February treatment.

9 Because any potential March or April misleading representation is the same
 10 as the February representation, the court should apply the same analysis it applied
 11 to the February treatment. The February representation goes to the gravamen of
 12 plaintiff's allegations of negligence because plaintiff cannot establish causation
 13 without proving negligence related to reading and advising plaintiff's decedent of
 14 what the x-ray depicted.

15
 16 **V. MOTION 4 – DR. SPOKAS' FAILURE TO DISCLOSE THE X-RAY DID NOT**
 17 **MISLEAD DECEDENT.**

18 **A. DECEDENT MUST HAVE RELIED ON THE REPRESENTATION.**

19 ORS 12.110(4) extends the statute of ultimate repose when a defendant's
 20 misleading representation causes plaintiff to delay filing an action until after 5
 21 years from treatment. ORS 12.110(4) tolls the 5 year statute of ultimate repose if
 22 plaintiff did not commence the action "because of ... misleading representation". A
 23 misleading representation for purposes of ORS 12.110(4) is one that misleads the
 24 plaintiff. *Jones v. Salem Hospital, supra*, 93 Or App at 260.

25 In order to be misleading, a representation must have some relationship to
 26 the plaintiff's knowledge or awareness of the facts constituting the claim. *Jones*, 93

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Or App at 263. A defendant's representation delays the running of ORS 12.110(4) only if the representation actually misleads the plaintiff and causes the plaintiff not to pursue the claim until she discovers the misrepresentations. *Duncan v. Augter*, 62 Or App 250, 258, 661 P2d 83 (1983), *rev den* 295 Or 122.

B. IF THERE IS NO EVIDENCE DECEDENT KNEW SHE HAD A CHEST X-RAY IN 2000, DECEDENT COULD NOT HAVE BEEN MISLED AND ORS 12.110(4) BARS THE ACTION.

Plaintiff alleges defendant "misleadingly misrepresented to decedent and her family that the x-ray was normal." The alleged misleading representation in this case was a failure to inform decedent of the chest x-ray results. PTO ¶ 4.a.(6);(7). To be protected by the ORS 12.110(4) tolling, decedent must have relied on Dr. Spokas' failure to inform her of the x-ray results. *Duncan, supra*, 62 Or App at 258.

If decedent was not aware there had been a chest x-ray, she could not have assumed the x-ray she didn't know about was normal. If decedent did not know there was a chest x-ray, decedent did not delay bringing her action because no one told her the x-ray results. In that case, the statute of ultimate repose bars the action.

C. ALLEGED REPRESENTATIONS TO A FAMILY MEMBER ARE IRRELEVANT.

Although plaintiff alleges defendant made a misleading representation to both decedent and her family, any alleged representation to decedent's family members is irrelevant. This court previously determined there was a representation for purposes of ORS 12.110(4) based on a physician's duty to inform a patient of test results. Findings and Recommendation, pp. 9-10. *Skuffeeda, v. St. Vincent Hosp. and Medical Center, supra*, 77 Or App at 483 n. 3 specifically held a physician has an affirmative duty to inform a patient of test results.

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1 However, *Skuffeeda* did not hold a physician has a duty to inform family
 2 members of those results. In fact, federal legislation protects the privacy of patient
 3 information. See 42 USC 1320d, Health Insurance Portability and Accountability
 4 Act of 1996. See also *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir.
 5 2004), (individuals have a constitutionally protected privacy interest in avoiding the
 6 disclosure of medical information).

7 If a physician has no duty to inform a family member of test results, the
 8 failure to inform a family member cannot be a misleading representation that tolls
 9 the statute of ultimate repose.

10 **D. FAMILY MEMBER'S KNOWLEDGE OF THE X-RAY IS IRRELEVANT.**

11 The fact that a family member knew decedent had a chest x-ray is not
 12 evidence that decedent knew about the x-ray. The only evidence relevant to toll the
 13 statute of ultimate repose is admissible evidence relevant to prove decedent knew
 14 she had a chest x-ray.

15 The statute of ultimate repose is only tolled if the person entitled to bring the
 16 action does not file within 5 years because of the misleading representation. ORS
 17 12.110(4). When decedent filed her personal injury action, decedent's family had
 18 no cause of action to pursue. Therefore, any alleged misleading representation to a
 19 family member could not toll the statute of ultimate repose.

20 **E. THE PERSONAL REPRESENTATIVE'S KNOWLEDGE IS IRRELEVANT.**

21 Decedent's husband testified in deposition that he knew about the x-ray.
 22 The fact that decedent's husband has alleged wrongful death damages does make
 23 any representation to him or another family member relevant.

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1 Plaintiff filed her personal injury action on April 7, 2006, more than 5 years
 2 after her treatment in 2000. That action continues after her death. ORS 30.075(1).
 3 The additional claim for wrongful death damages merely continues the decedent's
 4 cause of action because the claim is based on the same operative facts as
 5 decedent's personal injury action. *Doe v. American Red Cross*, 128 Or App 38, 42-
 6 43, 874 P2d 828 (1994), *aff'd*. 322 Or 502. The personal representative's wrongful
 7 death damages claim is timely only if decedent's original claim was timely. *Id.*

8 Because the timeliness of the wrongful death damages claim depends on the
 9 timeliness of decedent's personal injury action, the only statute of ultimate repose
 10 question is whether plaintiff delayed too long in filing her personal injury action.
 11 Because decedent's family did not have any claim against defendants at that time,
 12 the only relevant alleged representation is the one to decedent. If decedent could
 13 not avoid the statute of ultimate repose in her survival action, the personal
 14 representative cannot avoid it in his wrongful death damages claim.
 15

16 **F. THERE IS NO DIRECT EVIDENCE DECEDENT KNEW SHE HAD A**
 17 **CHEST X-RAY IN 2000.**

18 Based on deposition testimony, no witness has any personal knowledge
 19 whether the decedent knew a chest x-ray was taken. There is no direct testimony
 20 from decedent although she was alive at the time this proceeding was filed.

21 Decedent's husband testified in deposition that he knew about the x-ray but
 22 he did not know whether decedent knew. Deposition of Glenn Sonsteng, p. 25,
 23 lines 18-24. He did not testify he and decedent talked about the chest x-ray.
 24 Decedent's husband did not offer any evidence from which it can be inferred
 25 decedent knew about the chest x-ray. No other deponent testified regarding
 26 decedent's knowledge of the chest x-ray.

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1 The only two family members present in the emergency room with decedent
 2 were her husband Glenn Sonsteng and her daughter Diana Crumb. Diana Crumb
 3 testified she has no personal knowledge whether the decedent was taken to
 4 radiology for a chest x-ray. Deposition of Diana Crumb, p. 23, line 25 – p. 24, line
 5 9. No one told her there had been a chest x-ray. Crumb Deposition, p. 24, lines
 6 13-23. Diana Crumb never had a conversation with her mother about the x-ray.
 7 Crumb Deposition, p. 37, lines 21-23. Decedent did not inform her daughter she
 8 had an x-ray. Crumb Deposition, p. 37, lines 16-17. Diana Crumb has no personal
 9 knowledge of whether decedent was aware she had a chest x-ray in 2000. Crumb
 10 Deposition, p. 37, lines 11-23.

12 Another of decedent's daughters, Julia Harrison, didn't know before 2006
 13 that her mother had a chest x-ray in 2000. Deposition of Julia Harrison, p. 17,
 14 lines 23-25. Consequently, Ms. Harrison is unable to testify that her mother knew
 15 there had been a chest x-ray.

16 Dr. Fiorentino is the physician who ultimately told decedent about the 2000
 17 chest x-ray. Deposition of Larry Fiorentino, M.D., p. 47, lines 6-9. Dr. Fiorentino
 18 testified he was the one that told decedent in 2006 that there was something
 19 present before that had become a larger area. Id. When Dr. Fiorentino delivered
 20 that news, decedent was surprised. Fiorentino Deposition, p. 47, lines 13-14.
 21 Decedent did not indicate she knew about the 2000 chest x-ray. Fiorentino
 22 Deposition, p. 48, lines 7-9. Decedent did not say she had relied on the fact that
 23 the earlier chest x-ray showed nothing abnormal. Fiorentino Deposition, p. 47,
 24 lines 13-25; p. 48, lines 1-6.

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1 FRE 602 requires personal knowledge to support a witness' admissible
 2 testimony. The direct testimony is undisputed. No deponent testified he or she
 3 had personal knowledge decedent knew about the 2000 chest x-ray. Additionally,
 4 no deponent testified he or she had a conversation with decedent that indicated
 5 decedent knew about the x-ray.

6 **G. THERE IS NO PERMISSIBLE INFERENCE DECEDENT KNEW SHE**
 7 **HAD A CHEST X-RAY.**

8 The non-moving party is entitled to all reasonable inferences from the
 9 evidence. *U.S. v. Shumway, supra*, 199 F.3d at 1103-1104. However, to create a
 10 genuine issue of material fact, an inference must have a sufficient evidentiary basis
 11 to create a triable issue of fact for the jury. *Nat'l. Industries, Inc. v Republic Nat. Life*
 12 *Ins. Co.*, 677 F.2d 1258, 1267 (9th Cir. 1982).

13 A jury is permitted to draw only those inferences of which the evidence is
 14 reasonably susceptible. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th
 15 Cir. 1978), *U.S. cert den* 440 U.S. 981. A jury may not resort to speculation. *Id.*
 16 Speculation is not evidence sufficient to create a genuine issue of material fact
 17 sufficient to preclude summary judgment. *Karam v. City of Burbank*, 352 F.3d
 18 1188, 1194 (9th Cir. 2003). In this case, the deposition testimony does not permit a
 19 reasonable inference that decedent knew she had a chest x-ray. The inference is
 20 too speculative.

21 Diana Crumb testified decedent was alert, but "very sick" when the hospital
 22 staff took her to surgery. Crumb Deposition, p.36, lines 15-16. The chest x-ray
 23 was taken on the way to surgery. Deposition of Joseph Boyle, M.D., p. 22, lines 3-
 24 7.

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18 - MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SPOKAS'

MOTION FOR SUMMARY JUDGMENT

(Case No. 3:06CV-476-SU)

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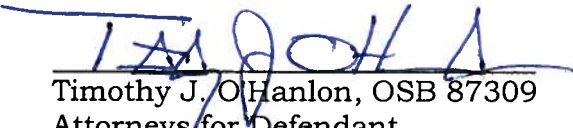
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1 A jury might reasonably infer that decedent knew she was having some
 2 medical procedure. However, in order to toll the statute of ultimate repose, the
 3 decedent must have known she had a chest X-ray. The decedent was being taken
 4 to surgery to remove her gallbladder. In light of that fact, it would be reasonable to
 5 infer the decedent knew she was having some medical procedure related to that
 6 gallbladder surgery. But there is no evidentiary basis to infer the decedent knew
 7 she had a chest x-ray. The jury could only make that inference by speculating,
 8 which is not permitted.

9
 10 Because there is no evidence sufficient to create a genuine issue of material
 11 fact regarding decedent's reliance on the representation, ORS 12.110(4) bars
 12 plaintiff's claims. Dr. Spokas is entitled to judgment as a matter of law.

13 DATED this 14 day of January, 2009.

14 MAUTZ BAUM & O'HANLON, LLP

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